IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

| | | |
|---|---|---|
| CSX TRANSPORTATION, INC., Plaintiff, | ) | CIVIL ACTION NO. 2:18cv530 |
| v. | ) | |
| NORFOLK SOUTHERN RAILWAY COMPANY, et al., Defendants. | ) | |

EXCERPT TRANSCRIPT OF PROCEEDINGS
**(*Daubert* Hearing - Rulings)**

Norfolk, Virginia

December 2, 2022

BEFORE: THE HONORABLE ROBERT J. KRASK
United States Magistrate Judge

APPEARANCES:

MCGUIREWOODS LLP
By: Benjamin L. Hatch
Robert W. McFarland
Ashley P. Peterson
Counsel for CSX Transportation, Inc.

TROUTMAN PEPPER HAMILTON SANDERS LLP
By: Michael E. Lacy
**- and -**
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
By: Tara L. Reinhart
Counsel for Norfolk Southern Railway Company

CRENSHAW WARE & MARTIN PLC
By: Alexander R. McDaniel
W. Ryan Snow
Counsel for Norfolk & Portsmouth Belt Line Railway Company

* * * * * * *

THE COURT: I am prepared to rule on the motion, which is ECF number 374, by CSX to exclude Thomas Crowley, and I'll start by starting with the case law that the attorneys from both sides have discussed.

Rule 702 of the Federal Rules and the line of cases flowing from the Supreme Court's decision in *Daubert* governs both the challenge by the Belt Line and by Norfolk Southern to Mr. Crowley's testimony.

Rule 702 provides that an expert may testify in the form of an opinion if the expert's scientific, technical, and other specialized knowledge will help the jury understand the evidence or determine a basic fact in issue, the testimony is based on sufficient facts or data, it's a product of reliable principles and methods, and the expert has reliably applied those principles and methods to the facts of the case.

Application of Rule 702, as all of you know, involves two primary inquiries; first, whether the proposed testimony is reliable and, second, whether it's relevant. And for that I cite the *Kumho Tire* case, 526 U.S. at 141 and the Fourth Circuit's case in *Forrest*, 429 F.3d at 80.

Before allowing a jury to hear disputed expert testimony, a Court must make those inquiries and exercise its gatekeeping functions, as the Fourth Circuit discussed in *Nease vs. Ford Motor Company*, 848 F.3d at 230 and page 231.

The Court assessing the relevance of an expert's testimony reviews, quote, whether it is sufficiently tied to the facts of the case and will aid the jury in resolving a factual dispute. And that's at *Daubert* at 591.

Expert testimony about matters coming within a jury's knowledge and experience is not helpful and is barred by Rule 702 as discussed in the *Persinger* case of the Fourth Circuit. It's a 1990 case at 920 F.2d at 1188.

To assess whether an expert's testimony will aid a jury to understand the evidence and resolve disputed facts, a Court must consider whether such testimony, quote, fits the facts of the case by relating to the inquiry that the jury has to make. And that's *Daubert* at 591 again.

To be deemed reliable, expert testimony must be grounded in, quote, scientific, technical, or other specialized knowledge and not on belief or speculation, and derived from the use of scientific or other valid methods. And that, I'm quoting the *Oglesby* case at 190 F.3d at 250. That's a Fourth Circuit case from 1999.

The *Daubert* decision identified what it referred to as some non-exhaustive guideposts that may apply when assessing reliability, to include testing, peer review, publication, air rates, and general acceptance of the methodology used. And that is at 593 and page 954.

Whether those guideposts or other factors apply to

assess reliability often depends on the nature of the case, the expertise applied, and the opinions at issue, as discussed by the Fourth Circuit in the *Sardis* case discussed by Mr. Snow. That's at 10 F.4th at page 281.

As the Fourth Circuit noted in *Nease* at page 230, the Supreme Court's decision in *Kumho Tire* made clear that *Daubert* was not limited to the testimony of scientists, and a nonscientist expert whose opinions arise from his experience must explain, quote, how his experience leads to the conclusion reached, why his experience is a sufficient basis for the opinion, and how his experience is reliably applied to the facts. And I'm quoting there the *Peters-Martin* Fourth Circuit case from 2011 at 410 F.App'x at 618.

Finally, the proponent of expert testimony, as you all know, bears the burden of establishing by a preponderance of the evidence that that testimony is admissible in accordance with these principles. And I'm citing *Cooper vs. Smith & Nephew*, a 2001 Fourth Circuit case, 259 F.3d at 199.

As to Mr. Crowley's qualifications, I find that he possesses the requisite knowledge, skills and experience, education and training to render an opinion on the Belt Line switching rate.

He has an economics degree, took graduate courses in transportation, and has worked as a consultant since 1971 specializing in analyzing matters related to rail transport.

He's familiar with the operating practices and accounting procedures that railroads use and has spent his career evaluating railroad rates, costs, and operations including the negotiation of rail and transport contracts. He has also testified before courts, regulatory bodies, and arbitration panels. So I find that he possesses the specialized experience necessary to opine about the reasonableness of the Belt Line's rate.

CSX argues Crowley's opinions on the reasonableness of the rate are not reliable and relevant because, as we've discussed here today:

First, he failed to apply an alternative coherent methodology as opposed to the Surface Transportation Board's reasonableness formula which everyone agrees does not apply. And they contend he used simple math to reach his conclusions;

Second, they argue that he failed to factor in the Belt Line's variable costs;

Third, he allegedly relied only on revenue from rates, ignoring other sources of Belt Line revenue;

Fourth, they complained that he made faulty assumptions that CSX moved two-and-a-half containers per well on average and rates are determined upon a per-mile basis;

Finally, they assert that he failed to consider whether the Belt Line would have made money under CSX's

proposals.

The Court finds Crowley's opinions on the reasonableness of the rate, including his opinion that Dr. Marvel's opinions are based on incomplete analyses, faulty comparisons, false presumptions, to be reliable and relevant.

CSX's argument that Crowley's expertise is limited to determining reasonableness using the Surface Transportation Board's formula, which does not apply in this case, is not persuasive. Crowley's experience analyzing the economics of the railroad industry qualifies him to opine outside the standard used by the STB.

Crowley testified that he applied, quote, normal, commonly used metrics to evaluate the rate based on his experience and, quote, what shippers and railroads normally look at in evaluating rates and revenues. While Mr. Crowley reached his conclusions by applying simple math to that data, this does not render those opinions unhelpful to the jury.

He testified to retrieving data based on his understanding of the metrics involved in determining costs and rates. He factored in his understanding of the location of certain railroad terminals to determine the length of various routes and researched Gulf Coast and East Coast ports that ship international containers and use shortline switching services.

He relied on his expertise to determine the data that would be relevant to calculate a reasonable rate; expertise that is not, quote, obviously within the common knowledge of jurors, as the Fourth Circuit discussed in *Lespier*. It's a 2013 Fourth Circuit case at 725 F.3d at 449.

CSX next asserts the analysis is faulty because Crowley failed to consider variable costs, instead relying on total costs. And CSX argues that he failed to account for volume and that overall expenses per car decrease as volume increases. Crowley can defend his decision to rely on total costs during cross-examination. His decision to do so does not render those opinions unreliable or irrelevant.

Similarly, while Crowley could be cross-examined about the Belt Line's revenues from sources other than switching fees, Cannon Moss of the Belt Line testified that over 90 percent of its revenue derives from switching fees. Mr. Crowley's failure to factor in revenue from a special switch charge for handling windmill blades and from leasing property is not a persuasive reason to exclude his opinions.

Next CSX argues that Crowley's assumption that CSX could move two-and-a-half containers per well on average is faulty, and CSX cites facts that CSX did not have double-stack capacity between NIT and the Midwest until December of 2016.

Crowley asserts that he relied on numbers used by

CSX witnesses, including their 30(b)(6) witness, to arrive at the 2.5 number along with evidence from VIT, Virginia International Terminal, that it loads three containers per railcar well 90 percent of the time.

There is a dispute about the average number of containers per railcar well loaded on CSX trains during the relevant time frame, and this will have to be addressed at trial. That dispute doesn't render Mr. Crowley's opinions on the matter excludable.

As for his consideration of cost on a per-mile basis, CSX's argument that this warrants exclusion also misses the mark. While switching railroads may not tie their rates to route length given the short distances involved, that does not mean that the length of the route does not affect the cost to the railroad to perform the service.

Crowley asserts that the length of the route factors into the cost structure, including fuel consumption and maintenance, and helps compare rates charged by switching railroads with different route lengths.

He acknowledges that he was not retained to opine on whether CSX's proposals could have made the Belt Line money, and his report does not address that issue, and he will not be permitted to testify on that at trial. But that does not also require excluding his remaining opinions.

Accordingly, I find his opinions on the

reasonableness of the Belt Line's rates are relevant and reliable, fit the facts of the case, and will assist the jury, and the motion to exclude those opinions is denied.

CSX next asserts that Crowley should not be allowed to opine about historical facts or offer legal conclusions about the Belt Line's governing documents. And in pages 7 through 9 of Mr. Crowley's report, he discusses that 1897 Operating Agreement, the Belt Line's Bylaws, formation of a rate committee in 2009, CSX's 2010 proposal, and its renewed proposal in 2018 as well as actions taken by the Belt Line in response to the proposals.

Mr. Crowley finds that CSX's proposals were outside the parameters of the Operating Agreement and contrary to the Bylaws. He offers this as a counternarrative to Dr. Marvel's assertion that the Belt Line rejected two proposals from CSX that would have been profitable to the company.

Mr. Crowley has not tied his knowledge of railroad rates, costs, and operations to his discussions of these historical documents and events or to any legal conclusions he may seek to draw. His report cites the documents themselves, board minutes, and deposition testimony of Belt Line employees as bases for the history provided.

While he may rely on this information as grounds for his opinions on a reasonable rate and refer to the Operating Agreement to explain the reason he focuses on costs rather

than profit in his calculations, he cannot provide this historical narrative to the jury.

Crowley will also not be permitted to opine that CSX's proposals violate the Agreement and Bylaws. And in that regard, I cite the case of *United States vs. Offill*, 666 F.3d at 175.

As was done in depositions, the Belt Line employees can provide the jury with the history surrounding the proposals and the Belt Line's response.

CSX's motion to exclude Mr. Crowley's testimony providing the historical narrative or legal conclusions about whether those proposals were contrary to the Agreement and Bylaws is granted. Mr. Crowley will, however, be allowed to rely on those documents to explain his approach to calculating a reasonable rate.

With respect to the subject of drayage, I find that Mr. Crowley's experience with railroad structure, operations, costs, contracts, and tariffs over his lengthy economic consulting practice qualifies him to render an opinion on drayage as an alternative to rail service for CSX at NIT.

CSX asserts Crowley's opinions on drayage are not reliable because, as just discussed, he allegedly relies on simple math to compare the cost of drayage to on-dock rail access while adding little to the analysis and because, they argue, he ignores evidence in the record regarding

nonmonetary factors making drayage an unreasonable alternative and, finally, that he allegedly ignored evidence in the record that drayage is only cheaper than on-dock rail due to the alleged anticompetitive conduct.

Crowley opines that the subsidized drayage service that CSX uses to move containers between NIT -- Norfolk International Terminal -- and CSX's intermodal yard at Portsmouth, quote, is an effective alternative to all-rail service over NPBL to NIT, end quote.

He explains that rail and drayage services compete for intermodal shipments throughout the country including at the Virginia Port Authority terminals. Mr. Crowley discusses the economics of drayage versus on-dock rail access at NIT by addressing the VIT subsidy for drayage and how that lowers the cost to dray below the cost of using on-dock rail at NPBL.

He also faults Dr. Marvel for comparing Norfolk Southern's access at the Belt Line to CSX's because Norfolk Southern has its own track that creates efficiencies that cannot be reproduced by the Belt Line for CSX.

Next Mr. Crowley argues that Dr. Marvel downplays the role of trucking in the intermodal freight market, and he references, as discussed, the large number of trucking companies, 145, offering drayage services to the Port of Virginia and the barriers to entry into the trucking market

and fixed cost of operations are the lowest of any freight mode.

He also argues, as Mr. McDaniel mentioned, that the initiation of the PRO-PASS system for trucks at NIT which became mandatory in April of 2018 drastically improved the performance of drayage companies including a reduction in wait times at the terminal gate. He attacks Dr. Marvel's reliance on discussions and data that predate this system at NIT when finding drayage is not efficient.

Mr. Crowley testified that he considered operations, quote, to the extent he could, unquote, along with the economics of using drayage and found that the, quote, operations seemed to favor dray as well.

CSX faults Mr. Crowley for failing to acknowledge the capacity limitations on drayage and limited trucking hours on that route.

Mr. Crowley asserts that the capacity of limitations largely were addressed by implementing the PRO-PASS system. He also asserts that CSX should have lobbied for extended gate hours at NIT, and I note, although CSX asserts the limitations are imposed due to local regulations and not NIT.

CSX also asserts that Crowley fails to address the evidence of record as outlined in CSX's Statement of Facts in support of its motion for summary judgment. This, quote, evidence of record consists in large part of assertions of

fact that are disputed.

Accordingly, I find Mr. Crowley relies on more than simple math to arrive at his opinions regarding the substitution of drayage for on-dock rail access at NIT. If CSX disagrees with the factors Mr. Crowley considered or disregarded or used in arriving at his opinions, CSX can cross-examine Mr. Crowley on those issues.

Accordingly, the motion to exclude Mr. Crowley's opinions on whether drayage is an effective alternative to on-dock rail at NIT is denied.

That's the Court's ruling on Mr. Crowley, and I intend to make rulings on a number of the other motions that have been filed, the motions in limine, and thankfully you will find that my rulings on those are shorter than my ruling on Mr. Crowley.

I am going to reserve on the Dr. Marvel motions, and, also, I'm going to reserve on, I think it's one other motion relating to that, the motion that's ECF number 337, the motion regarding the use of internal e-mails. And then I'm going to reserve on ECF number 349, which is the motion in limine to exclude evidence and argument regarding the internal use of internal Norfolk Southern e-mails.

So I'll next take up Norfolk Southern's motion in limine to exclude evidence and argument that the Belt Line switch rate is unreasonable.

Give me just a moment.

(Pause in the proceedings.)

THE COURT: Norfolk Southern's motion in limine to exclude evidence and argument that the Belt Line switch rate is unreasonable is denied subject, of course, to the Court's ruling on the pending motions for summary judgment.

The linchpin of Norfolk Southern's argument is that the Surface Transpiration Board, or STB, has sole jurisdiction to decide switch rates for Belt Line. As a result, Norfolk Southern argues that CSX may not ask the trier of fact to assess the reasonableness of the Belt Line switch rate, the Court may not remedy that rate, and the switch rate is irrelevant and beyond the scope of this case.

As Chief Judge Davis explained in ruling on the motion to dismiss with respect to this question of jurisdiction, I quote the STB's exclusive authority over rail carriers' mergers implicates the doctrine of, quote, primary jurisdiction, which, despite its name, is not jurisdictional.

Importantly, despite what the term "primary jurisdiction" may imply, it does not speak to the jurisdictional power of the federal court; it simply structures the proceedings as a matter of judicial discretion so as to engender an orderly and sensible coordination of the work of agencies and courts. That's ECF 395 at 4, and he quotes a Fourth Circuit case involving *Environmental*

*Technology Council*, 98 F.3d at 789, note 24.

Accordingly, the existence of STB authority to decide whether the Belt Line switch rate is reasonable does not mean that the Court lacks jurisdiction over CSX's claims. Such claims are properly before the Court, and in view of the need to consider, quote, the orderly and sensible coordination of work of agencies and courts, it is also noteworthy that the STB has stayed its proceeding pending the resolution of the case before this Court, with the STB being fully aware of this current litigation.

This leaves the question whether the evidentiary grounds exist to bar CSX from offering evidence as well as argument of an alleged excessive switch rate as proof in support of CSX's pending antitrust conspiracy and contract claims.

As noted by Chief Judge Davis, quote, CSX asserts that the establishment of such rate in 2009, and the maintenance of such rate over time, was the product of unlawful collusion. And that's ECF 395. I'm missing the page cite, but it's footnote 17.

In *Great Northern Railway Company*, the Supreme Court stated that the determination of a past wrong of, quote, an unreasonable or discriminatory rate is a judicial function. And that is at 259 U.S. at 291.

Therefore, in the context of addressing CSX's

pending claims, the question of whether the switch rate was excessive and used to block CSX from access to NIT is squarely a judicial function.

Norfolk Southern seeks to bar such evidence on the ground that only the STB is vested with authority to determine the reasonableness of the switch rate and that evidence directed to assessing whether it was excessive is irrelevant.

The jury, however, is not going to be tasked with adjudicating the proper switch rate. The relevant question in the context of the pending claims is whether the defendants conspired and colluded to set the switch rate at an inflated level so as to unlawfully and effectively preclude CSX from gaining on-dock rail access to NIT.

Evidence tending to establish such facts appears at this juncture to be of consequence to the pending claims. Accordingly, the Court denies Norfolk Southern's motion for a blanket exclusion order for such evidence. Of course, the admissibility of testimony and any individual items of evidence remains to be addressed at trial.

Finally, if Norfolk Southern seeks a limiting instruction concerning the proper use of any evidence about the establishment of a switch rate, it should include a proposed instruction as part of its proposed jury instructions.

That brings me next to ECF number 331, which again is Norfolk Southern's motion in limine to exclude evidence and argument on the loss of customer contracts by CSX.

And the first issue raised in this motion in limine is whether to prohibit CSX from presenting fact-witness testimony that CSX lost or was not awarded contracts with ocean carriers as a result of the defendant's conduct pursuant to Rule 802 of the Rules of Evidence.

CSX's evidence regarding loss of contracts appears to consist of hearsay evidence discussing what ocean carriers told CSX employees, and the hearsay rules will likely prevent the admission of this evidence.

However, the Court cannot rule categorically that CSX cannot present evidence regarding lost contracts without walking through each piece of evidence and hearing CSX's arguments about why the evidence is not hearsay or meets some kind of exception. And for that, I cite *United States vs. Gibson*, 2018 Westlaw 4903261 at *2. That's an Eastern District of Virginia case, October 9, 2018.

The second issue raised, assuming that Dr. Marvel is permitted to testify, is whether to prohibit him from presenting testimony that CSX lost or was not awarded contracts with ocean carriers due to defendant's conduct pursuant to Rule 703.

The relevant inquiry is, first, whether any

particular statement is hearsay or meets an exception; second, whether Dr. Marvel would be parroting hearsay without adding anything new to the statement; and, three, which side the balancing test established in Rule 703 favors.

The second and third prongs of this inquiry appear at this preliminary juncture to favor granting the motion, but just as a blanket evidentiary ruling that CSX's counsel and fact witnesses are precluded from testifying or arguing that an ocean carrier has denied CSX's business due to the lack of on-dock rail access at NIT is premature. The same is true regarding the scope of Dr. Marvel's potential testimony.

Accordingly, the motion is denied without prejudice to timely objection at trial. CSX is ordered to avoid discussing hearsay statements during opening statements, and should Dr. Marvel be allowed to testify, counsel for CSX is also directed to exercise care in eliciting testimony from him with an eye to the trial judge's rulings on the contested evidence.

That brings me next to Norfolk Southern's motion in limine regarding discontinuance of the Diamond Track. That motion seeks to prohibit CSX from offering at trial any evidence or argument that the discontinuance of the Diamond Track constituted anticompetitive conduct by the defendants. And that motion is denied without prejudice and, of course, subject to the Court's ruling on the motions for summary

judgment.

Norfolk Southern argues that CSX should not be allowed to relitigate the final judgment of the STB in 2008 proving the discontinuance of the Diamond Track. The Court agrees that CSX does not have standing to contest that decision and the Court does not have jurisdiction to overturn it.

CSX asserts it will offer evidence of the Diamond Track closure as one means by which Norfolk Southern sought to block CSX's access to on-dock rail at NIT for anticompetitive gain.

As addressed in the ruling on Norfolk Southern's motion to dismiss, this Court has jurisdiction over the antitrust and related state law claims pending before the Court.

To the extent CSX can prove at trial that the closure of the Diamond Track was undertaken to block CSX's access to on-dock rail at NIT, the evidence, to the extent that it's not time-barred, appears to be relevant to claims at issue under Rule 401 of the Rules of Evidence.

Norfolk Southern's argument that this evidence will confuse and mislead the jury is not persuasive. The facts surrounding the discontinuance of the track including the Surface Transportation Board's approval of the closure and CSX's failure to object at that time can be presented to the

jury.

Accordingly, the probative value of the evidence is not substantially outweighed by dangers of confusing or misleading the jury, and the evidence should not be excluded pursuant to Rule 403.

Norfolk Southern further argues that any evidence surrounding the Belt Line's meetings and Surface Transportation Board proceedings addressing the Diamond Track fall far outside the relevant time period, making the evidence irrelevant and inadmissible as it relates to the statute-of-limitations question.

That is a matter that the parties and the Court can revisit as needed following the Court's ruling on the motions for summary judgment.

Next I will address ECF number 353, which is the Belt Line's motion in limine to exclude evidence and argument about CSX's private switching rates.

The Belt Line's motion in limine to exclude evidence or argument about other contractual switching rates paid by CSX is denied.

Belt Line seeks to exclude that evidence and argument on the grounds that it's not relevant and, even if it were, it's unduly prejudicial pursuant to Rules 401, 402, and 403 of the Rules of Evidence. And, respectfully, I do disagree on both points.

Belt Line's relevance argument mostly relies on the *Laurel Sand* case that was discussed today, which is at 704 F.Supp. at 1323. And although the Court there stated that the reasonableness of a rate is determined, quote, in the context of competition rather than from the plaintiff's perspective, it nowhere indicated that negotiated contract switching rates should be excluded from the determination of whether a rate charged was anticompetitive; rather, it noted that a plaintiff's inability to pay a certain rate does not mean that the rate is anticompetitive.

Notably, the Court is *Laurel Sand* looked at the defendant's costs and the rates it charged another company, Millville Quarry, and determined that a rate offer slightly in excess of variable cost was not an anticompetitive rate. That's at Pages 1323 and -24.

CSX seeks to offer evidence about its contractually negotiated rates with other switching railroads for services allegedly similar to those provided by Belt Line.

As a general proposition, the Court agrees that such evidence is relevant to the market price for switching rates and whether the Belt Line's switching rate is anticompetitive; nor is there any evidence that the contract rates were negotiated in other than arm's length transactions.

Belt Line's argument about any differences between

contractually negotiated and public tariff-based switching rates goes to the weight, rather than the admissibility, of such evidence. It fails to support Belt Line's request for a blanket order of exclusion.

To the extent that Belt Line claims it lacked knowledge of CSX's contractually negotiated switch rates, Belt Line may seek to offer evidence about what it knew and the manner in which it set its public tariff switching rate, and the jury may consider the same in assessing whether such was excessive or anticompetitive.

Finally, nor is the admission of such evidence by CSX, or argument, unlikely to engender unfair prejudice to the defense by means of confusion or misleading the jury.

The Court is confident that a properly instructed jury can assess all the evidence, including any differences between the switch rates established by public tariffs and those agreed to in contract negotiations. Accordingly, the probative value of the contested evidence is not substantially outweighed by danger of unfair prejudice.

Next I will address ECF 359, which is the Belt Line's motion in limine to exclude evidence and argument from nonparties. And by that they refer to Virginia Port Authority and Virginia International Terminal officials.

The motion in limine to limit evidence and argument from those nonparties is granted in part and denied in part

without prejudice.

The motion is denied without prejudice as to testimony and evidence from current and former VPA and VIT employees about, one, the Belt Line switch rate; two, CSX's rail access to NIT; and, three, the April 13, 2018, letter from John Reinhart to Cannon Moss described in the Belt Line's motion.

The decision line between admissible versus inadmissible testimony about such matters is likely to be a fine one and cannot be made in a vacuum, essentially at a motion in limine phase in this case, without understanding the foundation laid for any such testimony, the question asked, and the information sought to be elicited.

Although Belt Line may well be correct that such witnesses should be foreclosed in characterizing the Belt Line switching rate as unreasonable and the like, with a proper foundation such witnesses may be allowed, for example, to compare the Belt Line's rate to other switching rates.

Likewise, with timely and proper objections, such witnesses may not be allowed to characterize CSX's rail access as, quote, improper or, quote, inequitable. However, such witnesses may have personal knowledge of events that permits them to offer less legally charged characterizations of their observations concerning the extent of CSX's access to NIT, and these questions are best addressed during trial.

For similar reasons, issues concerning the probative value and any prejudice stemming from admission of the April 13, 2018, letter are also reserved for trial.

Although CSX denies any intent to offer such testimony, to the extent it may seek to elicit testimony from such employees that they or the VPA or VIT, quote, support CSX's legal claims in the case, the motion in limine is granted; such testimony is irrelevant.

Further, as it falls to the jury to assess CSX's legal claims and any defenses thereto, any such testimony explicitly endorsing or vouching for CSX's legal claims by a quasi-governmental agency or its employees would also be highly prejudicial to the defense and subject to exclusion under Rule 403.

The Court reserves for trial questions about the admissibility of other testimony from such employees relating to VPA and VIT's desire for the parties to find a solution to facilitate greater use of NIT, and, finally, the proper scope of any argument based on the actual testimony and other evidence introduced through such employees is reserved for trial.

Next up is ECF 365, which is the Belt Line's motion in limine to exclude evidence and argument from CSX witnesses who lack personal knowledge. They reference some witnesses; Robert -- I may not pronounce his name correctly -- Girardot,

Chris Wagel, and Carl Warren.

My question for you, Mr. Hatch, is does CSX intend to call them to testify, or are we dealing with deposition testimony from these witnesses? Do you know?

MR. HATCH: Your Honor, we will be calling Mr. Girardot. We will not be calling live Mr. Warren and not as to Mr. Wagel either.

THE COURT: Do you intend to present evidence from them via depositions?

MR. HATCH: Yes, Your Honor.

THE COURT: Very well. Thank you.

MR. HATCH: Thank you.

THE COURT: With respect to the Belt Line's motion in limine to exclude evidence from the CSX witnesses who reportedly lack personal knowledge, the motion is granted in part and denied in part without prejudice.

And I grant the motion only in one respect; namely, that Mr. Girardot is precluded from testifying about statements, A, reportedly made by VIT management to Ocean Network Express personnel about the capacity to reliably dray containers between NIT and CSX's Portsmouth terminal and, B, made by Ocean Network Express personnel indicating that that carrier would have chosen CSX for business but for, or in significant part due to, concerns about CSX's lack of on-dock access at NIT.

This hearsay is inadmissible for the truth of the matter asserted in the statements Mr. Girardot describes. Similarly, because the probative value of such evidence does not substantially outweigh the dangers of unfair prejudice and risks that such evidence may mislead the jury, nor may CSX solicit testimony from Dr. Marvel about those statements if he's allowed to testify.

I have also considered the evidentiary arguments concerning admission of the remaining evidence and testimony identified in the Belt Line's motion concerning lost business opportunities allegedly sustained by CSX, the operation and application of the Belt Line's tariff, the preferences and practices of ocean carriers, calculations of the average number of shipping containers stacked by CSX in railcar wells, and the inadequacy of drayage as an alternative to on-dock rail access.

Having considered the affidavits at issue and the deposition testimony in question, the Court finds that it cannot conclude at this preliminary stage that all forms of testimonial evidence about those subjects is inadmissible as a matter of law.

To the contrary, questions of context, the knowledge and experience of the witnesses in question, the adequacy of any foundation laid for testimony about such topics, the nature of the questions asked, the purpose for which any

testimony is offered, and ultimately the admissibility of any such testimony are matters to be addressed at trial or, with respect to any depositions, possibly during the pretrial conference, and any deposition designations that are objected to.

Accordingly, in all other respects, the Belt Line's motion is denied without prejudice.

For the same reasons, and assuming for the purposes of this motion that Dr. Marvel is allowed to testify, the motion is also denied without prejudice to the extent that Dr. Marvel bases his opinions on testimony and evidence about the foregoing matters aside from those that I specifically identified with respect to Mr. Girardot's statements.

Again, I caution counsel for CSX to exercise care in eliciting testimony from Dr. Marvel with an eye to the trial judge's or possibly my rulings on deposition designations about whether testimony on the topics described is admitted or denied.

Next I address ECF number 378, which is CSX's motion in limine to preclude mischaracterization of its rate proposals. This motion is denied subject, of course, to the Court's rulings on the pending motions for summary judgment.

CSX seeks to exclude such evidence and argument on the ground that it is incorrect, improper, irrelevant, and prejudicial pursuant to the Federal Rules of Evidence.

The Court has considered the arguments relating to admissibility of evidence and argument concerning, first, whether CSX's 2010 and 2018 proposals were nonuniform rate proposals and, two, acceptance of CSX's proposals would have violated the Belt Line's Operating Agreement.

To start, the Court does not find that its previous order addressing the defendant's motion to dismiss -- and I refer to ECF number 66 at pages 26 to 28 -- precludes evidence and argument at trial about those two subjects.

At the present juncture, the Court is not tasked with evaluating the sufficiency of CSX's claims and pleadings but must decide whether to exclude broad categories of evidence from trial.

If evidence of these two proposals is admitted, one potential trial issue concerns whether the Belt Line and Norfolk Southern's treatment, handling of, and reaction to the 2010 and 2018 proposals constituted anticompetitive acts and/or evidence of an unlawful conspiracy.

Statements and acts contemporaneous with those events, including those addressing the formation of and reaction to the proposals, the parties' understanding about the proposals at the time, questions asked and answered and provided at the time, and the parties' views at the time about the interplay, if any, between the proposals and the Operating Agreement appear at this juncture to be relevant to

issues of alleged anticompetitive and conspiratorial behavior.

CSX's contention that the Belt Line previously considered and allegedly maintained nonuniform rates does not warrant a blanket exclusion of the types of evidence just described.

If evidence that the Belt Line had nonuniform rates exists, CSX may offer it to cast doubt upon the Belt Line's interpretation of the Operating Agreement and/or its treatment and handling of the two disputed proposals.

Finally, the admission of the evidence just described by the Court, or argument reasonably based thereon, would not unduly prejudice CSX by misleading or confusing the jury as its probative value appears not to be substantially outweighed by any prejudice ensuing from admission.

If, as CSX contends, one or both defendants attempt to offer after-the-fact explanations and/or acts and omissions not undertaken at or around the time the proposals were submitted and considered, the Court can best address that at trial by timely objection to the evidence when offered or argument when made.

Let me check with my clerks a moment.

(Pause in the proceedings.)

THE COURT: Aside from the motions that I have reserved on, then, I think that concludes our business here

today. Thank you for your patience and efforts here this afternoon. I appreciate your hard work on this case and your excellent briefing and argument.

MR. HATCH: Thank you, Your Honor.

MR. SNOW: Thank you, Your Honor.

(The proceedings adjourned at 4:04 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____/s/_____

Carol L. Naughton

December 6, 2022